

FILED
AUG 30, 2012
Court of Appeals
Division III
State of Washington

NO. 303187-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JACOB MICHAEL EASTEP, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00210-5

BRIEF OF RESPONDENT

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ISSUES

1. Did the officers properly perform their community caretaking function regardless of who said the words, "go, go, go?"
2. Was the defendant's right to effective assistance of counsel violated when defense counsel did not attempt to impeach the detective with his police report after he testified consistent with the content of the report?

STATEMENT OF FACTS

On February 26, 2011, at approximately 0046 hours, Kennewick Police Detectives Merkl and Trujillo were working from the same unmarked police vehicle in the area near the North Conway Apartments in Kennewick. (CP 22). The detectives were dressed in department issued garments that included a bulletproof vest with the words "POLICE" written in florescent lettering. (CP 22). The florescent lettering is visible even from a sitting position. (RP 10/05/11, 20).

While in the area, the detectives came upon a white Ford Bronco parked on the eastside of the

apartment building with its headlights illuminating the detectives' patrol vehicle. (CP 23; RP 10/05/11, 19). The detectives observed that a female, sitting in the driver's seat of the Bronco, began frantically motioning towards them with her hand in what they believed was an attempt to wave them over to help her with some emergency. (CP 23). As the detectives approached the vehicle, someone shouted, "go, go, go," and the vehicle took off at a high rate of speed. (CP 23; RP10/05/11, 20). The detectives, believing that the woman needed help, started to follow the vehicle, and observed it run a stop sign and excel the posted speed limit. (CP 23). The detectives activated their vehicle's emergency lights and attempted to pull the Bronco over to engage in a welfare check. (CP 23; RP 10/05/11, 26). The Bronco came to a stop one-fourth mile down the road. (CP 23). As the detectives were attempting to make contact with the female driver, they immediately recognized the

defendant, Jacob Eastep, and knew that he had outstanding warrants for his arrest. (CP 23). The defendant was ordered out of the vehicle, arrested, and searched incident to arrest. (CP 23). A glass smoking device with white residue, which field-tested positive for the presence of methamphetamine, was located in the defendant's right front sweatshirt pocket. (CP 23).

The defendant was charged with one count of unlawful possession of a controlled substance. (CP 1-2). A motion to suppress all evidence found during the February 26, 2011, incident was filed on August 31, 2011, but was later denied after a 3.6 hearing was held. (CP 6-14, 22-24). The trial court held that the detectives had a reasonable belief that the female driver needed their assistance based upon her actions, and that the totality of the circumstances warranted a welfare check. (CP 24). It also held that because the stop was proper, the arrest and the subsequent search were proper and anything found

during the search was admissible as evidence. (CP 24).

ARGUMENT

1. REGARDLESS OF WHO ACTUALLY SAID, "GO, GO, GO," THE DETECTIVES PROPERLY PERFORMED THEIR COMMUNITY CARETAKING FUNCTION.

"As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution." *State v. Garvin*, 166 Wn.2d 242, 207 P.3d 1266 (2009). "Nonetheless, there are a few jealously and carefully drawn exceptions to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant ... outweigh the reasons for prior recourse to a neutral magistrate." *State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668 (2000). The burden falls on the State to show that a warrantless seizure falls within one of these exceptions. *Id.* The community caretaking

function is one such exception. *State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004).

"The 'community caretaking function,' . . . allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety." *Id.* Such invasion is allowed if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched. See, e.g. *State v. Kinzy*, 141 Wn.2d 373. "Once the exception does apply, police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function." *Kinzy*, 141 Wn.2d at 388.

Detectives Merkl and Trujillo were properly performing their community caretaking function when they seized the Ford Bronco. Both detectives testified that the female driver "frantically" waved them down; each subjectively believing that she was in need of assistance. (RP 10/05/11, 13, 19-20). Both detectives also testified that because they were under a belief that she needed assistance, it was their duty to help. (RP 13, 21). The detectives' belief that she needed assistance was heightened when the vehicle took off at a high rate of speed and committed other traffic infractions. (RP 10/05/11, 21). Detective Merkl testified that based on the female's actions and the subsequent vehicle flight, he believed that some type of crime was occurring, not by the female, but possibly by someone else in the vehicle. (RP 10/05/11, 8).

Although both detectives use the phrase "suspicious," they do not use it in the sense

that the defendant would have you believe, and in fact defense counsel takes it out of context. (Appellant's Brief 10-11). The word "suspicious," as used by both detectives, was based on their belief that she needed help, not that the female in the vehicle was acting criminally. (CP 13; RP 10/05/11, 21). The female's frantic wave, the statement "go, go, go," the high rate of speed, and the traffic infractions were not normal, everyday actions undertaken by someone in the presence of police officers. Such actions are "suspicious" and confirmed the detectives' belief that the female was in need of assistance. Based on the above "suspicious" activity, any reasonable person in a similar situation would have believed that the female driver was in need of assistance.

Because the detectives were under the belief that the female driver needed assistance, it was proper to engage in a seizure of the vehicle, for a short period, to ensure she was in fact safe.

If such belief is found to be subjective and proper, then it does not matter who in fact uttered the words "go, go, go." The detectives were engaging in a welfare or safety check based on the totality of the circumstances. Even if the female driver spoke the words "go, go, go," this would not alleviate the subjective belief that the detectives had that she needed assistance; in fact it could serve to heighten such belief. As stated prior, Detective Merkl believed that some type of crime could have been ongoing, including the crime of kidnapping. (RP 10/05/11, 8). If true, the duress placed upon her by some unknown passenger could force her to utter such words, not because she didn't want to speak with the officers, but because she feared for her safety, the exact concerns the detectives had.

The detectives' seizure of the vehicle to determine what type of assistance the female

driver needed should be found to be proper regardless of who said, "go, go, go."

2. DEFENSE COUNSEL'S FAILURE TO QUESTION DETECTIVE MERKL CONCERNING A POSSIBLE INCONSISTENCY IN HIS REPORT DOES NOT VIOLATE THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, ESPECIALLY WHEN THE DETECTIVE TESTIFIED CONSISTENT WITH THE REPORT.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984)). The burden is on the defendant to show two things; (1) that defense counsel's representation was deficient, and (2) that defense counsel's deficient representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). If the defendant fails to show either of the two above requirements, then he fails to show that defense counsel was ineffective. *Id.*

Representation is deficient if counsel's performance falls below an objective standard of reasonableness based on consideration of all the circumstances. *Id.* "The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation." *Grier*, 171 Wn.2d at 33. Defense counsel's choices do not have to be strategic, only reasonable. *Id.* There is a strong presumption that the defense counsels performance was reasonable. *Id.* "A criminal defendant can rebut the presumption of reasonable performance by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance." *Id.*

The defendant's argument stands and falls upon the notion that defense counsel should have used Detective Merkl's police report to impeach his testimony. The burden is on the defendant to demonstrate that his counsel had no conceivable legitimate tactic for not using the report

against the detective. *Id.* This burden has not been met.

Defendant also argues that if defense counsel would have used the police report to impeach the detective's testimony about who said "go, go, go," the court would have decided differently. The defendant has the burden to show that the result of the proceedings would have been different but for counsel's deficient representation. *McFarland*, 127 Wn.2d 322. The burden has also not been met.

Detective Merkl only once testified that he could not remember who said "go, go, go." (RP 10/05/11, 13). However, this statement came directly after he stated that he believed it was the female driver. (RP 10/05/11, 13). The detective also stated, on at least two other occasions during his testimony, that it was likely the female driver. (RP 10/05/11, 8, 12). Defense counsel had no reason to re-question him regarding the statement. Such tactic was likely

to keep from drawing too much attention to this statement. The court also had testimony that was not impeachable with the police report, that someone other than the female driver uttered the three words. (RP 10/05/11, 19-20). Defense counsel's decision not to use the report was reasonable under the circumstances.

Even if defense counsel's decision not to use the police report is found to be unreasonable, it was not the primary reason as to why the court decided against the suppression motion, and such motion would still have been denied. Thus the defendant did not sustain any prejudice.

As stated above, the detectives properly performed their community caretaking function regardless of who said the words, "go, go, go." The court took into account the female frantically waving toward the detectives, the speedy flight of the vehicle, the excess speed observed by the detectives, the traffic

infractions, the failure of the vehicle to immediately stop, and the fact that the detectives were only contacting the vehicle to "ascertain if she was in danger or needed assistance." (CP 23). Again, the defendant has the burden to prove that the outcome would have been different had the police report been used and he has failed to do this.

CONCLUSION

The detectives were properly engaged in their community caretaking function when they stopped and seized the Ford Bronco. Defense counsel's failure to question Detective Merkl regarding who said, "go, go, go," was a tactical decision and did not prejudice the defendant. Therefore the defendant's right to effective assistance of counsel was not violated.

RESPECTFULLY SUBMITTED this 30th day of
August 2012.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

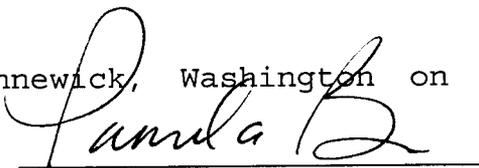
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